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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM BOYD MILLER III, Defendant and Appellant.	2d Crim. No. B295952 (Super. Ct. No. VA097054) (Los Angeles County)

William Boyd Miller III appeals an order denying his Penal Code section 1170.95 petition for resentencing of his prior second degree murder conviction.[1] (§§ 187, subd. (a), 189.) He claims he is entitled to relief following the recent passage of Senate Bill No. 1437. We conclude, among other things, that Miller did not make the required prima facie showing for relief because the record shows he was the actual killer. We affirm.

[1] All statutory references are to the Penal Code.

FACTS

Miller beat his elderly father to death. His father was in "frail health." He breathed with the assistance of a portable oxygen tank and used a walker to move about the home. (*People v. Miller* (June 15, 2009, B208472) [nonpub. opn.].)[2]

Miller was convicted of second degree murder and "elder or dependent-adult abuse resulting in death, with victim age-related sentencing findings. (Pen. Code, §§ 187, subd. (a), 189, 368, subd. (b)(1).)" (*People v. Miller*, *supra*, B208472.) The trial court imposed a prison sentence of 15 years to life. In 2009, we affirmed that conviction. (*Ibid.*)

In 2018, the Legislature passed Senate Bill No. 1437. It authorized a procedure for those convicted of first or second degree murder to petition for resentencing. (§ 1170.95.) It changed the standard for first or second degree murder convictions (§§ 188, 189) based on the felony murder rule or the natural and probable consequences doctrine. "These changes, which the Legislature adopted in 2018 in Senate Bill 1437 and which went into effect on January 1, 2019, ensure that murder liability is not imposed on a person *who is not the actual killer*, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147, italics added.)

In 2019, Miller filed a petition for resentencing under section 1170.95. In the petition, he stated, among other things, that he "was not a major participant in the felony *or* [he] did not act with reckless indifference to human life during the course of

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[2] The People's request for judicial notice, filed November 5, 2019, is granted.

the crime or felony." He said, "I was convicted of 2nd degree murder under the natural and probable consequences doctrine or under the 2nd degree felony murder doctrine and I could not now be convicted of murder because of changes to Penal Code § 188, effective January 1, 2019"; "I request that this court appoint counsel for me during this re-sentencing process."

After filing the section 1170.95 petition, the trial court did not appoint counsel. It issued an order denying the petition, stating, "The court has read and considered defendant Miller's petition for resentencing pursuant to [section] 1170.95. [¶] After review of the court file and appellate opinion, it appears defendant was the actual killer and is not entitled to relief as a matter of law."

DISCUSSION

The Section 1170.95 Petition

Miller contends the trial court erred by denying his section 1170.95 petition and by not appointing counsel for him.

The People contend Miller failed to make an initial prima facie showing that he fell within the provisions for relief under section 1170.95. They claim that because the record showed that Miller was the actual killer and his petition was insufficient, the trial court properly denied his section 1170.95 petition. We agree.

Section 1170.95, subdivision (a) provides, in relevant part, "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the

petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019."

Section 1170.95, subdivision (c) provides: "The court shall review the petition and determine *if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.* If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (Italics added.)

In 2009, when we affirmed Miller's second degree murder conviction, we said, "*Miller beat his father–a frail elderly man attached to an oxygen tank–to death and did not assist him as he lay dying.*" (*People v. Miller*, *supra*, B208472, italics added.) Murder committed by the actual killer is the type of crime that falls outside the scope of relief authorized under section 1170.95. (*People v. Anthony, supra*, 32 Cal.App.5th at p. 1147.)

Miller contends the trial court erred by denying his petition without first issuing an order to show cause and by not appointing counsel for him. We disagree.

The first step in the section 1170.95 procedure requires the petitioner to make a prima facie showing that he or she is eligible

for relief. In other analogous contexts, courts have held that a prima facie showing for resentencing normally requires the petitioner "to present evidence of facts" to show he or she falls within the resentencing provision. (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.) This burden is not met by merely checking boxes on a form containing conclusory allegations. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 137.) Instead, the petition should contain "the factual basis" for those conclusory statements. (*Ibid.*) That may include a summary of trial evidence or "citations to the record of conviction that would have directed the superior court to such evidence." (*Ibid.*) The petition should contain information about the nature of the crime. (*Ibid.*) The petitioner has the " ' "burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . ." ' " (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.)

Here Miller simply checked boxes on a short form containing conclusory allegations. He did not state facts relating to the nature of his crime or his conduct in committing it. He did not refer the court to trial testimony or citations to the record. He did not attach exhibits. He did not state facts to show that he was not the actual killer and he made no offer of proof. But even assuming he met the initial statutory requirements by checking boxes, that does not mean he was automatically entitled to relief.

Here all the trial court had before it was a short form with conclusory allegations. The court could reasonably find that because Miller did not produce evidence or show any factual grounds for the issuance of an order to show cause, it should look to the record to determine the actual nature of the crime. (*People v. Lewis* (Jan. 6, 2020, B295998) _ Cal.App.5th _, _ [2020

Cal.App. LEXIS 9, 8-9 ["Under section 1170.95, subdivision (c), the court was required to review defendant's petition and determine whether he made a prima facie showing that he 'falls within the provisions of' the statute"].) We agree with the authors of a treatise on California's sentencing law. They conclude, "It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the [section 1170.95] petition, which frequently are erroneous, *when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief*." (Couzens, Bigelow & Prickett, Sentencing California Crimes (The Rutter Group Oct. 2019 update) § 23:51, p. 5, italics added.) Where the allegations of the petition are directly refuted by the record, the court may find the petitioner is not credible. (*In re Serrano* (1995) 10 Cal.4th 447, 456.) Here Miller's statement in the petition that he "was not a major participant in the felony" is refuted by the record.

Miller contends the trial court erred by not initially appointing counsel for him. The statute authorizes the appointment of counsel. But "[n]othing in section 1170.95 requires the court to provide counsel to petitioner in the preparation of the petition for resentencing." (Couzens, Bigelow & Prickett, Sentencing California Crimes, *supra*, § 23:51, p. 6.)

The standard practice allows the defendant to file the petition and counsel to be appointed later. (*People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 526-527.) Here, however, the provision authorizing the appointment of counsel follows the portion of the statute that requires the petitioner to initially make a prima facie showing for relief. (§ 1170.95, subd. (c).) The

sequential order of these provisions is significant. (*People v. Lewis*, *supra*, _ Cal.App.5th _, _ [2020 Cal.App. LEXIS 9, 15] ["we construe the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95[,] subdivision (c); that is, after the court determines that the petitioner has made a prima facie showing that petitioner 'falls within the provisions' of the statute"].) As the authors of the sentencing treatise note, "[T]he court may conduct a preliminary review of the circumstances of the petition prior to appointing counsel." (Couzens, Bigelow & Prickett, Sentencing California Crimes, *supra*, § 23:51, p. 6.) The court does not err by not appointing counsel in cases where no order to show cause could issue. (*People v. Cornelius* (Jan. 7, 2020, B296605) _ Cal.App.5th _, _ [2020 Cal.App. LEXIS 11, 5] [claim that defendant was entitled to appointment of counsel rejected where he was "indisputably ineligible for relief"].)

Miller contends the trial court erred by initially reviewing the record after it received the petition and then denying relief.

In cases where a valid petition is filed, the court may properly delay reviewing the record until after the People file their response. But, in light of the unique facts of this case, we conclude the trial court acted properly by promptly reviewing the record. In his petition, Miller stated, "*There has been a prior determination by a court or jury that I was not a major participant and/or did not act with reckless indifference to human life* . . . . Therefore, I am entitled to be re-sentenced pursuant to § 1170.95(d)(2)." (Italics added.)

Because of this representation, the trial court could reasonably determine that it should immediately review the record because this allegation, if true, would authorize the

granting of the petition. But once the trial court reviewed the record, it found the opposite was true. The petition, therefore, had no merit. Where the review of the court file shows, as here, that the petitioner is not entitled to relief, "it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing." (Couzens, Bigelow & Prickett, Sentencing California Crimes, *supra*, § 23:51, p. 5.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Debra Cole-Hall, Judge

Superior Court County of Los Angeles

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Assistant Attorney General, Amanda V. Lopez and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.